UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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CHICAGO, IL 60604-3590

APR 26 2013

REPLY TO THE ATTENTION OF:

WN-16J

Kevin H. Elder
Division of Livestock Permitting
A.B. Graham Building
8995 E. Main Street
Reynoldsburg, OH 43068

Dear Mr. Elder:

This is a response to your letter of April 2, 2013 concerning a request by State legislative members for a list of items required legislatively for the criminal penalties section of Ohio's statute concerning concentrated animal feeding operations (CAFOs).

The Clean Water Act (CWA) and the U.S. Environmental Protection Agency's regulations require that the burden of proof and the degree of knowledge or intent required under state law shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the CWA. Ohio's current statute does not require recovery against any person who negligently violates the relevant laws and therefore is not as stringent as the EPA's regulations. Please see enclosed memorandum concerning this issue.

The language in House Bill 59, lines 20661 through 20701, as introduced on February 12, 2013 has been reviewed by EPA and has been found acceptable. The ability to enforce for criminal violations of environmental laws and regulations is a critical part of the State's ability to carry out its responsibilities under the National Pollutant Discharge Elimination System program.

Ohio needs to enact House Bill 59, lines 20661 through 20701, as introduced on February 12, 2013 in order for EPA to continue our consideration of Ohio's request to transfer the CWA regulatory program concerning CAFOs from the Ohio Environmental Protection Agency (OEPA) to the Ohio Department of Agriculture (ODA). As previously indicated, Ohio will need to submit amended and updated documents requesting the transfer including, but not limited to, a modified program description, Attorney General's statement, and Memorandum of Agreement. EPA will review these documents and make a final decision on this matter after receipt of such documents.

EPA is unable to estimate a timeframe for a final decision at this time, however, we will process this matter as soon as we are able once the new statutory language is enacted and an updated package is received.

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If you have any questions concerning this matter, please contact Michael Berman of the Office of Regional Counsel at 312-886-6837 or Julianne Socha of my staff at 312-886-4436.

Sincerely,

for Tinka G. Hyde
Director, Water Division

Enclosure

Introduction

This memo is intended to provide specific information about Ohio's National Pollution Discharge Elimination System (NPDES) program that does not comply with the requirements established in the Environmental Protection Agency's (EPA) regulations regarding program enforcement. In particular, the Ohio code provides for a criminal intent standard for negligent violations that renders the proposed program less stringent than the federal program. EPA's Office of Criminal Enforcement, Forensics and Training (OCEFT) is working with the State of Ohio and EPA Region 5 to address this matter and has reached agreement on statutory changes that would correct the specific deficiency.

The Clean Water Act (CWA or Act) authorizes the Administrator of the Environmental Protection Agency (EPA or Agency) to issue permits for the discharge of pollutants into navigable waters on the condition that such discharges comply with the terms of the permits. (33 U.S.C. § 1342(a)). These permits are referred to as NPDES permits. Consistent with Congressional intent, States may administer the NPDES permit program upon a showing that they have adequate authority to carry out the program requirements.

Federal Statutory Background

The CWA's 1342 State program approval requirements provide that States must have adequate enforcement authority, specifically:

> "The administrator shall approve each such submitted program unless he determines that adequate authority does not exist: … [T]o abate violations of the permit or permit program, including civil and criminal penalties and other ways and means of enforcement;"

33 U.S.C. § 1342(b)(7).

The CWA establishes two types of criminal penalties for violations of the Act's permitting requirements. These are negligent or misdemeanor penalties found at 33 U.S.C. § 1319(c)(1), and knowing or felony penalties found at 33 U.S.C. § 1319(c)(2). The Act also establishes fines for these types of violations. Negligent violations of the CWA are punishable "by a fine of not less than $2,500 nor more than $25,000 per day of violation," and knowing violations are punishable "by a fine of not less than $5,000 nor more than $50,000 per day of violation."

State Program Approval Regulations

The State NPDES program approval regulations are found in Part 123 of Title 40 of the Code of Federal Regulations. Requirements regarding program enforcement are found at 40 C.F.R. § 123.27. Paragraph (a)(3)(ii) of this section provides, among other things, that States must have authority to seek fines for criminal violations as follows:

> Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement. These fines shall be assessable in at least the amount of $10,000 a day for each violation.

40 C.F.R. § 123.27(a)(3)(ii).[1] This paragraph is followed by an explanatory note that reads as follows:

> Note: States which provide the criminal remedies based on "criminal negligence," "gross negligence" or strict liability satisfy the requirement of paragraph (a)(3)(ii) of this section.

This note explains that the required ability to recover fines may be satisfied if criminal sanctions are available for criminal negligence, gross negligence, or, even, strict liability. It is noteworthy that the note is self-limited to 123.27(a)(3)(ii) and, thus, pertains only to the assessment of criminal fines as a remedy. Further, the note is not substantive, it is merely a comment on the substantive language and cannot override or carve out an exception. Neither the substantive language of (a)(3), nor the accompanying note, directly address the issue of burden of proof and degree of knowledge or intent associated with establishing or proving a violation of the Act. The burden of proof and culpable mental state requirements are found in a different paragraph. This paragraph states:

> The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act.
>
> > Note: For example, this requirement is not met if State law includes mental state as an element of proof for civil violations.

40 C.F.R. § 123.27(b)(2).

It is clear from the language of (b)(2) that it is applicable to all of section (a)(3) and that it specifically articulates that State law may not provide for a more lenient mental state standard than does federal law. Moreover, there is no contradiction between section (a)(3) and section (b)(2), as the former addresses the requirement for authority to seek fines and the latter addresses the requirement for a consistent burden of proof and mens rea standard. Even assuming that the note in (a)(3) does address burden of proof issues, it must be read in harmony with the

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[1] The use of the "willful and negligent" language in this paragraph is a remnant of the pre-1987 CWA prior to the amendments that changed the criminal provisions to knowing and negligent. While the Agency has not updated these regulations to reflect the new terminology of the 1987 CWA amendments, the regulations are clear that State programs may not have intent standards less stringent than the federal standard.

substantive language of (b)(2) and as explained above, the note cannot trump the substantive language of (b)(2).

Legislative History and Case Law Governing the CWA's Negligence Standard

It is well settled that the CWA's criminal intent standard is simple negligence. Both legislative history and case law are clear on this matter. The legislative history of the CWA supports the position that Congress intended to create a simple negligence standard. The only legislative commentary on the negligence standard, dating from the original 1972 enactment, suggests that the Act requires proof of simple negligence and nothing more. In a debate concerning whether to include a provision allowing for criminal penalties for violations of EPA orders, Representative Harsha stated that this would be unnecessary, since, "[W]e can already charge a man for *simple* negligence, we can charge him with a criminal violation under this bill . . . ." *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Vol. 1 at 530 (emphasis added); *reported* in 118 Cong. Rec. 10, 644 (1972). Such statements, when undisputed, are a guide in determining legislative intent. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982) (statements by the sponsor of legislation may be understood "as an authoritative guide to the statute's construction.") There is no other legislative history on the negligence standard.

Three appellate courts, the Ninth, Tenth, and Fifth Circuits, have addressed the issue of the CWA criminal negligence standard. In *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000), the court of appeals affirmed the conviction below, relying upon the plain wording of the statute and its view that the FWPCA (i.e., CWA) is a "public welfare" statute, as it previously had determined in *Weitzenhoff*, to conclude that the standard in *33 U.S.C. § 1319(c)(1)* is one of simple negligence. 176 F.3d at 1120-122.

In *United States v. Ortiz*, 427 F.3d 1278 (10th Cir. 2005), the 10th Circuit affirmed the 9th Circuit's position in *Hanousek*. Ortiz was convicted by a jury of negligently discharging a pollutant into the Colorado River and the district court subsequently entered a judgment of acquittal. The court ruled as a matter of law that an individual is not guilty of a negligence discharge unless he knows the pollutants path terminates in protected waters. In overturning the lower court, the appeals court stated, "If Ortiz failed to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance and, in so doing, discharged a pollutant into the Colorado River without a permit to do so, then he violated *§ 1319(c)(1)(A)*." *Ortiz* at 1283.

Recently, in *United States v. Pruett*, 681 F.3d 232 (5th Cir. 2012), the defendant challenged his conviction for negligent CWA violations on the grounds that the jury instruction that ordinary negligence was sufficient for conviction was erroneous and should have stated "gross negligence" as the standard. In upholding the conviction, the Court, stated, "…we are bound by *§ 1319(c)(1)(A)*'s plain and unambiguous language. We must therefore conclude that *§ 1319(c)(1)(A)* requires only proof of ordinary negligence." 681 F.3d at 242. The Court further noted that its position was consistent with *Hanousek* and *Ortiz*.

The mens rea or intent standard that must be met to establish a criminal negligence violation is ordinary negligence, not a higher standard. Any state law or regulation that establishes an intent standard higher than ordinary negligence is thereby inconsistent with the CWA's legislative history, CWA case law, and EPA's regulation at 40 C.F.R. § 123.27(b)(2).

Ohio's Criminal Intent Standard

As explained further below, the state of Ohio applies a criminal negligence standard that is not ordinary negligence and therefore not compliant with EPA regulations. Ohio's Revised Code (ORC) § 903.99, the relevant provision at issue, addresses the penalties for violations of Ohio's pollution discharge permit requirements. Section (A) provides criminal liability for "whoever violates" the laws requiring pollution discharge permits. While the "whoever violates" language of § 903.99(A) suggests this is a strict liability offense, Ohio courts have shown a reluctance to impose strict liability. This is codified in ORC § 2901.21(B) which states:

> When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

The Ohio Supreme Court has interpreted ORC § 2901.21(B) to require a "clear" showing of legislative intent to impose strict liability. *State v. Moody*, 104 Ohio St.3d 244, 246 (2004). In *Moody*, the Court was asked whether a statute imposing criminal liability for contributing to the unruliness of a child was a strict liability offense. *Id.* at 245. The Court held that the "no person shall" language of the statute was not sufficient to plainly indicate legislative intent to impose strict liability. *Id.* at 248. The Court also noted that where the General Assembly could easily have included mens rea language into the statute, but chose not, is further evidence of the lack of legislative intent. *Id.*, quoting *State v. Collins*, 89 Ohio St.3d 524, 530 (2000). Without a clear showing of an intent standard in ORC § 903.99(A), the default standard would be recklessness. That would be inconsistent with EPA's requirement for state program authority governing state criminal intent standards. Pursuant to 40 CFR 123.27(b)(2), intent standards under state law may not be greater than those relied upon by EPA when bringing an enforcement action.

Examination of Ohio's code reveals that negligence under Ohio law is not interpreted to be the "ordinary" negligence consistent with the federal standard. ORC § 2901.22(D) defines negligence as:

> A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to

> circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

The Ohio Revised Code Annotated (ORC Ann. 2091.22), Editor's note provides:

> "a person is said to be negligent under the section when, because of a substantial slip from the standard of care required of him under the circumstances, he fails to notice or take steps to evade a risk that his conduct may cause a certain result or be of a certain nature, or that certain circumstances may exist. Although the definition of "negligence" in the new code is structured similarly to the definition of ordinary negligence used in tort law, it defines a higher degree of negligence than ordinary negligence. For one to be negligent under this section, he must be guilty of a substantial departure from due care, whereas ordinary negligence merely requires a failure to exercise due care."

Ohio case law supports this interpretation:

> An examination of the definition of criminal negligence shows that there must be a "*substantial lapse*" from due care. Under this standard it is [***5] obvious that something more is required than the failure to exercise due care. *State v. Ovens (1974), 44 Ohio App.2d 428, 73 O.O.2d 540, 339 N.E.2d 853*. Whether a lapse of due care is "substantial" for purposes of criminal negligence is a determination for the trier of the fact. *State v. Newton (1985), 23 Ohio App.3d 184, 23 OBR 427, 492 N.E.2d 455*; *State v. Ovens, supra.* A finding of criminal negligence requires proof of an appropriate [*461] standard of due care, and a corresponding lapse from that standard which must be substantial. State v. McKeand (Sept. 29, 1986), Butler App. No. CA86-02-018, unreported, 1986 WL 11405.

State v. Madden, 61 Ohio Misc. 2d 458, 460-61 (MC 1989).

The Ohio criminal negligence standard is clearly not ordinary negligence and thus not consistent with the CWA and EPA's regulations.